

7th Circ. Reverses US Soccer Tequila Ad Arbitration Ruling

By **Suevon Lee**

Law360, Los Angeles (September 22, 2016, 11:16 PM EDT) -- United States Soccer Federation Inc. scored a win against a labor union for U.S. men's national team members when the Seventh Circuit Thursday reversed an arbitrator's decision, saying he erred in ruling that a tequila print ad featuring players' likenesses required advance approval.

The arbitrator wrongly found that the portion of the United States National Soccer Team Players Association's collective bargaining agreement concerning sponsor use of the likenesses of six or more players in ads was ambiguous and exceeded his authority when he interpreted the contract to require union approval for such print ads, a unanimous three-judge appeals panel held.

"Here, the arbitrator erred. We echo the district court's observation that the arbitrator 'at times invoke[ed] the terms 'silence' and 'ambiguity' far too cavalierly,'" wrote Circuit Judge Michael Stephen Kanne for the panel.

The panel's reversal, with instructions on remand to vacate the award and enter judgment in favor of the federation, nets a win for U.S. soccer's national governing body in a dispute over the running of a poster ad for el Jimador tequila prior to the 2014 World Cup.

Under the players' collective bargaining and uniform player agreements, U.S. Soccer or other parties are prohibited from using a player's likeness without the player or his representative's approval for sponsorship's sake. But when the promotional use includes likenesses of six or more players, the agreement states the Federation "will request, but not require" a sponsor contribution to the player pool, Thursday's decision recapped.

After the players' association voiced disapproval over the proposed El Jimador ad, the Soccer Federation responded in February 2014 by issuing a declaration to the union that it had no contractual obligation to submit print or digital creative ads featuring a player pool to the association for advance approval.

The players' association filed a demand for arbitration, alleging this declaration amounted to an anticipatory breach of the agreements, according to Thursday's ruling. In September 2014, the arbitrator ruled in favor of the union, saying the agreements are "silent" on the point of whether advance approval is required for creative ads featuring six or more players' likenesses.

Thomas F. Gibbons looked to the soccer federation's past practices of "openly and repeatedly forward[ing] print creatives to the Players' Association for its review and approval for more than a

decade” and said this pattern evinces an intent of the parties in view of the alleged ambiguity.

The arbitrator concluded that this longstanding voluntary practice of prior submission – which the Soccer Federation ceased in 2013 — created an implied contractual term, and ruled for the union.

A U.S. district judge confirmed the award one year later, saying that while the arbitrator’s interpretation here may have been “unsound,” it wasn’t enough to warrant the ruling be overturned.

On Thursday, the Seventh Circuit noted that while judicial review of arbitration awards should be “extremely limited,” its deference to such decisions is not “unlimited.”

It specifically noted the clause in the players’ agreements that says the federation “will request, but not require” sponsor contribution to the player pool in creative ads featuring six or more players’ likenesses.

The panel distinguished the language in this clause concerning print creative ads with language concerning “spot” ads, or video commercials, where the parties agreed only to approval by the players’ association.

“Having established that the relevant provisions of the CBA/UPA governing sponsor use of print creatives are clear and unambiguous, it easily follows that the arbitrator ‘exceeded the powers delegated to him by the parties,’” the decision stated.

In March oral arguments before the panel, an attorney for the soccer federation argued it was important to overturn the arbitrator’s decision since the players’ association had adopted a position of “inconsistency and unreasonableness” leading up to the 2014 World Cup.

The attorney said the federation was losing sponsors due to the players’ stance.

In addition to Judge Kanne, Circuit Judge Daniel Anthony Mannion and U.S. District Judge Pamela Pepper sitting by designation sat on the panel.

Representatives for the parties couldn’t immediately be reached for comment Thursday.

The federation is represented by Melissa Arbus Sherry, Benjamin W. Snyder, Russell F. Sauer Jr. and Noah Fischer of Latham & Watkins LLP.

The players group is represented by Mark S. Levinstein, Allison B. Jones and David K. Baumgarten of Williams & Connolly LLP.

The case is United States Soccer Federation Inc. v. United States National Soccer Team Players Association, case number 15-3402, in the U.S. Court of Appeals for the Seventh Circuit.

—Additional reporting by Jessica Corso. Editing by Joe Phalon.